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NO. 97-756

IN THE SUPREME COURT OF THE UNITED STATES OF AMERICA

October 1997 Term

Harvey F. Burge, Linda Sanders fka Linda Burge
and Marjorie C. Sanders
Petitioners

v

Paul C. Behr and Bonnie Burke-Behr
Respondents

ON PETITION FOR WRIT OF CERTIORARI TO
Court of Appeals, State of Colorado

BRIEF FOR AMERICANS FOR TAX REFORM AS AMICUS CURIAE SUPPORTING PETITIONERS

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QUESTION PRESENTED

Does a federal agency have the power to convey title within the states absent judicial supervision?

Colorado has held that the language of 26 USC 6335 and 26 USC 6339, [federal tax statutes controlling the sale of seized property through auction], conveys property title rather than just equity interest. This interpretation makes an administrative sale equivalent to a judicial foreclosure, precluding the taxpayer the right to a subsequent state judicial foreclosure on either the federal tax deed, or any superior deed of trust.

The question presented is whether this scheme is constitutional under the Due Process Clause of the Fifth and Fourteenth Amendments and whether it conflicts with the limitations of federal powers to convey property titles within the states, a power which was heretofore exclusively reserved for the states through the 10th Amendment.

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Harvey F. Burge
Linda Sanders fka Linda Burge and
Marjorie C. Sanders
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vs

Paul C. Behr and Bonnie Burge Behr
Respondents

Petition for a Writ of Certiorari to the Colorado Court of Appeals

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BRIEF FOR AMERICANS FOR TAX REFORM
Amicus Curiae Supporting Petitioners

INTEREST OF AMERICANS FOR TAX REFORM

This case presents an important question concerning the power of the federal government, through it's agency the Department of Treasury, through *it's* agent, the Internal Revenue Service, to convey property title at auction, rather than through judicial process[1]. While Congress currently

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[1] This brief was authored in part by the undersigned with research provided by Declan J. O'Donnell, Esq. Fees and costs were shared by Americans for Tax Reform

works to reform the IRS and "rein in" it's unchallenged increasing powers, this decision works the opposite end, and gives the administrative procedures of the IRS more power, and hence, the taxpayer, less. This results in eroding what America was once known for, e.g. *property rights.* Americans for Tax Reform is a non profit corporation created to guard the rights of the American Taxpayer and promote the cause of general tax relief.

STATEMENT

On March 28, 1994 a tax lien was sold to the Respondents, investors, at an IRS auction. When the homeowners, Petitioners herein, refused to redeem the tax lien, asserting procedural defects in the sale, the Respondents were issued an IRS "Director's Quit Claim Deed", inferior only to the First Deed of Trust mortgage. With such deed, the investors claimed 100% ownership rights to the property, and immediately evicted the taxpayers, without first foreclosing on either the Quit Claim Deed or the mortgage deed of trust. This, they did with the authority of court orders which held that an IRS auction, and the resulting Quit Claim Deed, conveyed the homeowners first deed of trust and all possessory rights to the investor. Because of this sequence of events, the homeowners were precluded a full judicial procedure in which to expose the defects in the IRS administrative sale, which they claimed voided the tax sale, and the resulting

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and an independent taxpayer, Charles M. Meyers. Consent to file was granted by opposing counsel, John Reha on December 1, 1997.

Quit Claim Deed[2]. This new process resulted in the investor walking away with $150,000.00 in equity, even after subtracting the price paid for the tax lien, and the amount of the outstanding mortgage. While benefiting investors, this new holding is not in harmony with the intent of the Constitution which protects property rights, rather than for plunder. It also conflicts with other established law, in that the mortgagee bank began foreclosure on the taxpayers,according to the terms of the contract, *after* the eviction. An absurdity.

In addition to the issues argued by Petitioner regarding federal powers, the undersigned respectfully state the following.

I. AN FEDERAL ADMINISTRATIVE PROCEDURE CANNOT CONVEY PROPERTY TITLE.

The holding of the Colorado courts is not in harmony with the 10th Amendment to the Constitution, which grants to the states all powers not enumerated to the federal government in Articles 8 and 9 of the Constitution. While "laying and collecting taxes" is a power of the federal government, conveyance of Real Property title is not. The IRS can "collect tax" by selling their interest in a taxpayer's property, represented by a negotiable

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[2] The court gave the homeowners a 90 minute eviction hearing for which no pre trial preparation was applied. The trial was cancelled as redundant, see Order, Appendix A12 of Petition.

instrument[3], e.g. a tax lien. However, selling an interest is not selling the deed, something the IRS did not have. It is a well established legal principle that a lien cannot represent anymore than the debtor had, see Clark, Federal Tax Liens, 33 Va. L. Rev. 13, 17 (1947); Anderson, Federal Tax Liens, 41 Calif. L. Rev. 241, 250 (1953). Therefore, the Quit Claim Deed could not represent a right to circumvent state property conveyance law. Additionally, a federal Quit Claim Deed, acquired through auction, could not represent a "title" interest.

A deed to property, (as opposed to an interest) can only be acquired through state law, pursuant to the powers granted to the states through the Constitution. Even when a tax lien evolves into a "Quit Claim Deed", such deed cannot represent ownership rights, because the lien, upon which it was based, did not represent ownership rights. The Federal Tax Lien Act, PL 89-719, 80 Stat. 1125 specifically states that an IRS lien does not affect any superior interest in the property. Further, even federal regulations make this distinction, 26 USC 301.6335-1(c)(4)(iii). This regulation states that a federal lien *is subject to* superior interests and also, state property laws. In that a Director's Quit Claim Deed only represents a prior tax lien, which does not represent the superior deed of trust, pursuant to the Federal Tax Lien Act, it cannot represent full title to the property.

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[3] The Uniform Commercial Code identifies the characteristics of a negotiable instrument, UCC 3-102 and 3-302, which includes a note or lien on real property.

To interpret a federal Quit Claim Deed as an instrument which is exempt from state property conveyance laws suggests that a federal agency has control over property titles within the states. This assertion is contrary to the Constitution, to wit: separation of powers and the powers granted exclusively to the states, through the 10th Amendment.

If a federal agency can convey property title, through administrative procedure, what need have we of the federal statutes provided for the same, to wit: 28 USC 2001, 2002 and 2410? What need have we for state property conveyance laws?

If allowed to stand, the Colorado decision voids the Federal Tax Lien Act, and federal regulation, 26 USC 301.6335-1(c)(4)(iii) by holding that the tax lien, and resulting Quit Claim Deed, supersede the first deed of trust and all state foreclosure law which heretofore governed the involuntary conveyance of real property.

The taxpayers here, should have been entitled to a state foreclosure process, at which to present their claims of defective IRS sale procedures, because the IRS auction could not be deemed an equivalent substitute for state judicial process. To hold otherwise voids all State property conveyance laws and precludes homeowners "full and fair adjudication" to protect that most sacred right to property. To allow this decision to stand will gut American property rights and render the Constitution meaningless.

If this decision stands it will grant a federal agency the same powers as a state court to convey title. Where

will it end? Will all state laws be deemed moot eventually?

II. THE CONSTITUTION DOES NOT PROVIDE FOR THE FEDERAL GOVERNMENT TO USURP STATE PROPERTY LAWS.

This Supreme Court held, albeit many years ago, that real property conveyance was a power reserved to the individual states, see US v Fox, 94 US 315 at 320-321 which states:

> "The power of the State to regulate the tenure of real property within her limits, and the modes of its acquisition and transfer, and the rules of its descent, and the extent to which a testamentary disposition of it may be exercised by its owners, is undoubted ..... The title and modes of disposition of real property within the State whether *inter vivos* or testamentary, are not matters placed under the control of Federal authority. Such control would be foreign to the purposes for which the Federal government was created, and would seriously embarrass the landed interests of the States".

Clearly, if the Colorado decision is allowed to stand, it gives the power to the courts to relinquish state sovereignty. This, they cannot do, pursuant to the holding of this Supreme Court, in US v NY, 112 S. Ct. 2408 (1992) at page 2431, to wit: "... a departure from the constitutional plan cannot be ratified by the "consent" of state officials".

Further, this holding, voiding state foreclosure, deprived a lienholder to the property, Ms. Sanders, of the

usual judicial forum (for creditors) to defend her interest. The Colorado Courts held that the eviction hearing was "adequate" to determine all rights to the property, even in her absence, see decision in Appendix A of Petitioner's Writ, at page 12 where the court held that "cancelling the quiet title hearing"[4] was not error because "the issue of the tax sale" had previously been fully litigated at an eviction hearing. How can anything be "fully litigated" in an abbreviated 90 minute eviction hearing without all parties present? For that reason, some States have held that eviction hearings cannot determine property rights, fully argued in the Petitioner's Writ at page 10, which we support. However, this Colorado decision effectively voids any lienholder from even asserting property rights after an IRS Quit Claim Deed is issued, because any judicial foreclosure process previously provided has been eliminated by this decision.

Should a federal Quit Claim Deed be exempt from judicial foreclosure?

III. THE COLORADO DECISION INTERFERES WITH CONTRACT LAW.

Perhaps the most important reason the Colorado decision should be reversed, is the fact that it puts a court "Order" above published law and Article I Section 10 of the United States Constitution. Art. I ¶ 10 states,

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[4] The trial court cancelled the scheduled trial and precluded testimony from the homeowners IRS Expert Witness, see Order, Appendix A12 of Petition.

"No state shall make any law impairing the obligation of contracts".

This decision voids the terms of the first deed of trust which required that a default in the mortgage to be

remedied by a state foreclosure process. Such foreclosure process protected the owners "property rights" in that the owners were permitted a judicial forum in which to assert any defense he may have had.

While blaming federal law for conveying "all right, title and interest" through auction to an investor, the Colorado decision ignores the implied limitations of that phrase, imposed by the Constitution. The mortgage contract required judicial process before liquidation and neither the federal government, nor any court, can alter those terms. The Supreme Court held, in New Orleans v New Orleans Water Works, 142 US 79, at 91,

> "Courts have no power to make new contracts or to impose new terms upon parties to contracts without their consent".

See also, Parish v Progressive, 874 P. 2d 1049, Wota v Blue Cross, 831 P. 2d 1307.

However, this Colorado decision claims that a federal Quit Claim Deed conveys the taxpayer's first deed of trust, and mortgage to the investor, in violation of the clause which precludes assignment. The Colorado courts approved of the investor subsequently conveying title to the property with a Warranty Deed he prepared himself, rather than with a Public Trustee Deed, Sheriff's Deed or

Marshall's Deed. For this reason, (eliminating the foreclosure process) the public record shows no release of the first deed of trust from the taxpayer. Another absurdity.

The Supreme Court held, in N.Y. v U.S., 112 S. Ct. 2408 (1992) at 2432, "State officials thus cannot consent to the enlargement of the powers of Congress beyond those enumerated in the Constitution." Supreme Court decisions have confirmed that the federal government cannot invade a States legislative jurisdiction, New York v US, 112 S. Ct. 2408, 2431 (1992) and US v Lopez, 514 US --, 131 L. Ed 2d. 626, 115 S. Ct. -- (1995), therefore, the IRS auction, and resulting Quit Claim Deed cannot void the terms of the mortgage contract which was subject to the state foreclosure process.

If the Colorado courts can alter mortgage contracts, how soon before courts alter other contracts and undermine all other business dealings and transactions contrary to the limitation of powers imposed by the Constitution?

CONCLUSION

The judgment of the Court of Appeals of Colorado should be reversed.

Respectfully submitted,

AMERICANS FOR TAX REFORM
by Peter J. Ferrara, Esq.